The Top Ten List: Rules Lawyers Must Know

by Stephen A. Saltzburg

Legend has it that there are only two kinds of trial lawyers: the quick and the dead. Speed is essential at trial, and no more so than on the rules of evidence. The trial lawyer without evidentiary objections at her fingertips or ready to launch responses to her opponent's objections is courting failure. The wrong objection or the wrong response is probably no better than nothing at all. Close may work with horseshoes and hand grenades. With evidence at trial, it is almost indistinguishable from just plain wrong.

True, procedural rules are also important. But evidence rules are special. They demand more of trial lawyers than do civil or criminal procedure. Sure, a trial lawyer has to know that a motion for judgment as a matter of law or a motion for judgment of acquittal is required to preserve a sufficiency of the evidence issue. But planning for this motion begins long before trial or, at least, well before all of the evidence is presented. With procedural issues, there is usually an opportunity for research, for thoughtful consideration, and for consultation with others.

You may also get a crack at evidence issues before trial in the friendly confines of your office or library. Rules like Federal Rules of Civil Procedure 16 and final pretrial orders ensure that even careless trial lawyers will be thinking about some evidence issues before the first witness is called. No one, though, can predict what will happen when the testimony actually begins, when questions are asked and answers given in the heat of trial. Inadmissible evidence is forever at the threshold.

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Good evidence is forever at risk from specious objections. If you do not know your rules, expect to suffer.

But there are rules, and there are rules. In getting ready for trial, even the most diligent and experienced trial lawyer may not have time to review all of the rules and think about their likely effects on the upcoming trial. A ranking of the rules by importance seems to be in order. Master those that are most important and avoid spending precious time on those where the payoff may be less. But which rules to learn? That *is* the question.

My list contains 23 rules that trial lawyers ought to master. If this seems like a lot, I have also offered my top ten list, which actually includes eleven rules, because of a tie for last by two of the most underutilized rules of all. The list first, then the explanations. I have bunched them into six topical groups. Asterisks designate the top ten, while the double asterisks mark the tie for last. The parentheticals refer to the key subsections.

Offering and Objecting

Rule 103--Rulings on Evidence (a,c)
Rule 104--Preliminary Questions (a,b)
Rule 105--Limited Admissibility

Relevancy

* Rule 401--Relevant Evidence
* Rule 402--Relevant v. Irrelevant Evidence
* Rule 403--Exclusion of Relevant Evidence
* Rule 901--Authentication or Identification (a)
* Rule 611--Mode and Order of
Rule 1006--Summaries

Character Evidence

* Rule 404--Character Evidence Generally (b)
Rule 608--Evidence of Character and Conduct (b)
Rule 609--Impeachment By Evidence of Conviction of Crime (a)

Flexible Impeachment

* Rule 607--Who May Impeach
Rule 612--Writing Used to Refresh Memory
Rule 613--Prior Statements of Witnesses
** Rule 806--Attacking and Supporting Credibility of Declarant

Opinion and Expert Witnesses

Rule 701--Opinion Testimony By Lay Witnesses
* Rule 702--Testimony By Experts
Rule 703--Bases of Opinion Testimony By Experts

Hearsay

* Rule 801--Definitions (a, c, d)
Rule 803--Hearsay Exceptions; Declarant Available (1-6, 8, 18, 24)
Rule 804--Hearsay Exceptions; Declarant Unavailable (b)(1), (b)(5)
** Rule 602--Lack of Personal Knowledge

Before getting to the rules themselves, what about the numbers? Are they important? Should lawyers operating under the Federal Rules or some similar state version feel obligated to cite rule numbers when objecting to the trial court? Reasonable minds differ about this, but my experience is that substance should dominate form. It's nice to demonstrate your erudition by citing the correct rule number, but it is generally more important to educate the trial judge and the jury about the substance of an objection or response that may make the difference between winning and losing.

Take a simple example. Assume the prosecution asks a witness during a homicide trial, "As you stood there over the person who was bleeding, did that person say anything?" Is it more important for defense counsel to jump up and say "hearsay" or to invoke Rule 802? Rule 802 is cited so infrequently that even the trial judge might well wonder what rule that is. The jurors, to be sure, would be totally befuddled. But they will surely understand the word "hearsay." Likewise, the prosecutor is better off saying, "Your honor, it is an excited utterance" or "It is a dying declaration," than citing Rule 803(2) or Rule 804(b)(2).

Danger in Numbers

There actually are two dangers when lawyers reach for rule numbers. The first danger is that they will state the wrong number. All honest trial lawyers (and evidence teachers) admit that they sometimes have to look at the rules to remember the numbers. Uttering the wrong number is worse than uttering no number at all. Second, though he may be less willing to admit it, the trial judge also confuses rule numbers. Unless the judge offers reasons for a ruling, you may never even know if the judge was confused.

One objection, however, ought to be made by rule number in almost every case. Any time you invoke Rule 403, you ought to do so by number. Think about the alternative: "Your Honor, this evidence is so prejudicial that, if the jury hears it, it will overwhelm all other evidence." The judge may understand the objection better, but so will some, if not all, of the jurors. If the objection is overruled, it will become certain, rather than merely probable, that the evidence will have the extreme impact that gave rise to the objection. Even if the objection is sustained, the jury knows that there is something pretty bad out there that you do not want them to hear.

There are other situations in which rule numbers can be important. For example, you may want to call the trial judge's attention to particular language in an evidence rule. A complex argument based on particular language in a rule will require the trial judge to read the relevant rule, probably from a copy of the rules at the bench. In most cases, though, go for the principle not the number. You will get it right and so will the judge.

The first group of rules--Rules 103, 104, and 105--are not rules that lawyers need to know by

number but are critical for understanding the basic rules of offering and objecting to evidence. Rule 103 sets forth the same basic rules as at common law. Under Rule 103, trial judges will not intervene when evidence is offered unless a timely objection is made, and appellate courts will not consider a challenge to a successful objection unless the substance of the excluded evidence is known. Rule 104 sets forth the judge's responsibility to interpret and apply the rules of evidence.

Simple enough? On closer inspection, there are both opportunities and land mines here. It hardly seems sensible, for example, to object to evidence that was the target of an unsuccessful motion *in limine.* But, in *Luce v. United States,* 469 U.S. 38 (1984), the Supreme Court stated in dictum that a motion *in limine is* not a final ruling and must be renewed at trial. Numerous appellate opinions have imposed such a renewal requirement in various situations. Conversely, Rule 103(c) seems to be of very little value, providing only that in jury cases, "proceedings shall be conducted, to the extent practicable, so as to prevent inadmissible evidence from being suggested to the jury by any means." This rule may, however, be useful to a lawyer trying to stop an opponent from making "speaking objections" in front of the jury or to counsel who wants to make an evidence argument outside the hearing of the jury. Rule 104(a)'s principle that the judge determines admissibility seems commonplace. But at times this can make the judge a fact finder. Under Rule 104(b), when evidence is relevant only if some fact or other is true, the trial judge decides whether there is sufficient evidence for a reasonable juror to find the necessary fact. In *Bourlaily v. United States,* 483 U.S. 171 (1987), the Supreme Court held that the trial judge uses a preponderance of the evidence standard in ruling on coconspirator statements offered under Rule 801(d)(2)(E). Pairing this rule with Rule 104(a) gives trial lawyers a very useful rule of thumb: *The lawyer who relies on a rule of evidence has the burden of showing, by a preponderance of the evidence if facts are disputed, entitlement under the rule.* Thus, a lawyer who objects to admission of a statement on the ground of attorney-client privilege must show that the elements of a privilege claim exist, just as the proponent of a statement as an excited utterance must show that the statement satisfies the requirements of Rule 803(2).

Rule 105 also deserves consideration. It provides that, upon request, a party can obtain a limiting instruction when evidence is admitted for a limited purpose. Because Rule 105 requires a request for an instruction, just as Rule 103 requires an objection and an offer of proof, trial lawyers are on notice that they cannot expect the trial judge *sua sponte* to explain to the jury how evidence may be used. Experienced trial lawyers will decide what language to suggest to the judge. The most experienced lawyers may ask the judge not to give a specific instruction to the jury, out of fear

that the instruction might do more harm than good. Instead, they ask the court to instruct opposing counsel not to use the evidence except in a limited way.

After admissibility, the next set of rules concerns relevancy. One federal district judge gave a speech a few years ago claiming that he only needed two evidence rules, 401 and 403, to do his job. Rule 401, he said, permitted him to admit anything, while Rule 403 permitted him to exclude anything. An exaggeration? If so, only a slight one. The judge should probably have mentioned Rule 402 as well.

All three make the "top ten" for good reason. Rule 401 provides a very generous definition of relevance. Evidence is relevant if it adds in the slightest to a case. Trial judges have tremendous discretion in determining what evidence is relevant.

Rule 403 provides trial judges with a variety of reasons to exclude relevant evidence not excluded by other rules. Rule 403 can knock out the prejudicial, the confusing, the misleading, the cumulative, the time-consuming, even the "unnecessary." Its breadth means that trial lawyers can--and do--cite it at any time they have no other objection to make. A successful Rule 403 objection is nearly bulletproof. Appellate opinions generally pay great deference to trial judges who make Rule 403 rulings. After all, the trial judge sees and hears the litigants and observes the jury while appeals court judges have only a cold record on which to base their decisions.

Sometimes overlooked, though, is Rule 402. As interpreted in *United States v. Abel,* 469 U.S. 45 (1984), this rule makes all relevant evidence admissible, even if no other rule says so, as long as there is no provision in law that excludes the evidence. Many types of relevant evidence are not specifically mentioned in rules of evidence. All are presumptively admissible under Rule 402. In *Abel,* for example, the Court noted that no rule must say that bias evidence is admissible to impeach a witness. Bias evidence is relevant and therefore admissible under Rule 402. Rule 402 also states clearly that irrelevant evidence can never be properly admitted.

More Admissibility Rules

Two other admissibility rules also make the top ten. First, there is Rule 901(a), which is closely related to Rule 401. The basic rule of authentication, Rule 901(a) states that "evidence sufficient to support a finding that the matter in question is what its proponent claims" is all that is needed. Essentially, any relevant evidence of genuineness is enough for authentication. As in the definition of relevance in Rule 401, only a minimal showing is necessary. In both cases, the question is not whether the trial judge believes the evidence, but whether a reasonable juror could. A trial lawyer who knows these rules understands that there are virtually unlimited ways to authenticate evidence.

Another top-ten rule, related to the relevance rules, is Rule 611 (a). Under this Rule, the trial judge controls the scope and order of proof. He may impose time limits on parties, permit witnesses to testify out of turn, and take virtually any step that he concludes will avoid prejudice,

waste of time, and cumulative evidence or enhance a jury's understanding. This rule dovetails nicely with Rule 403's authority to bar evidence that is time-consuming, cumulative, or unnecessary. If you want a trial judge to do something unusual, reach for Rules 61l(a) and 403. Lots of real experimentation can be sold as trial management.

Not on the top-ten list, but related to these admissibility rules, is Rule 1006, which permits summaries of voluminous material. Rule 1006 is what's left of the best evidence rule now that Rule 1003 provides that most duplicates are presumptively admissible. Rule 1006 permits trial lawyers to present voluminous materials in an understandable way. The only caveat is that the summaries are admissible only if the underlying documents would be. Summaries of inadmissible evidence are themselves inadmissible.

But remember Rule 611(a). Under its management provisions, the trial judge can permit summaries of evidence that do not qualify under Rule 1006. For example, the judge may be persuaded that a chart used by a law enforcement officer to trace a series of telephone calls and to summarize how they connect to one another is a summary of trial evidence. The chart would not qualify under Rule 1006, but it may still come in under Rule 61 l(a).

A third set of rules are those on character evidence. Rule 404(a) codifies the common law rule: Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion .... General proof of a predisposition to act a certain way is not very probative of how a person acted on any given occasion. But character evidence can be dynamite. Jurors may give it undue weight and punish a person based on his general character rather than the facts in a particular case: thus, the basic rule excluding evidence of character.

The exceptions are, however, legion and legendary: intent, knowledge, identity. You may not be able to use character evidence to prove a character trait, but you may be able to use it to show these elements and many others. Think of the wife-beating evidence in the O.J. Simpson trial.

The government is commonly eager to offer such 404(b) evidence in criminal trials, ostensibly for a narrow purpose, but well aware of its more general effect. The only constraint is *Huddleston v. United States*, 485 U.S. 681 (1988), which obligates the trial judge to evaluate character evidence under Rules 104(b), 401, and 403. Nor are the relatively loose application and potentially explosive effects of Rule 404(b) evidence limited to criminal cases. They also apply in employment discrimination cases to prove intent.

The ever-present potential for misuse of character makes this evidence difficult to control. It also places Rule 404(b) squarely on the top-ten list. Plaintiffs and prosecutors need to be aware of how to get in such evidence. Defense counsel in both civil and criminal cases must resign themselves to the relevance standard and prepare their objections under Rule 403. The outcome of a case may depend on it.

Do not confuse Rule 404(b) with its second cousins in Rules 608(b) and 609(a). Rule 404(b) evidence can be offered in a plaintiff's or prosecutor's case-in-chief, whether or not any particular witness testifies. Prior bad acts under Rule 608(b) and prior convictions under Rule 609(a) become significant only after a witness takes the stand. They are rules of impeachment.

Still, I believe these rules are best thought of in connection with Rule 404(b) because they raise similar issues. Essentially, the critical question is whether introduction of the evidence is likely to result in misuse. Will the evidence be interpreted as proving action in the present case in conformity with the prior bad act, in violation of Rule 404(a)? Rule 403 must be ready at the fingertips of defendant's counsel here as well.

There are, however, other limitations in Rules 608 and 609 that are not found in Rule 404(b). For example, Rule 608(b) permits a witness to be questioned about prior bad acts (or a character witness to be questioned about what she knows or has heard), but the questioner is

bound by the witness's answer. Extrinsic evidence is prohibited. And, Rule 609(a) contains a specialized balancing test that favors the criminally accused.

Keep in mind that the Supreme Court's *Luce* decision throws the weight of these decisions on the trial judge. *Luce,* discussed above, holds that a ruling on what impeachment is allowed if a defendant testifies is not appealable unless the defendant takes the stand and actually is impeached. Hypothetical rulings are not appealable. If the witness does not testify following an unsuccessful *in limine* ruling, there is no impeachment and no basis for appellate court review.

Group four of the key rules are Rules 607, 612, and 613. I call these the flexible impeachment rules, because they give a trial lawyer many more options for impeachment or anticipating impeachment than were available at common law. Rule 607, for example, scuttles the common law bar on impeaching your own witness. Among other things, it permits a party to anticipate an adversary's impeachment and to "remove the sting" by eliciting negative material on direct examination. Read together with Rule 402, Rule 607 permits any relevant impeachment evidence to be offered unless some other rule, like Rules 608 and 609 says otherwise. This makes the rule a charter member of the top-ten list.

There is one caveat about Rule 607. If a lawyer knows that a witness has recanted a prior statement, she may not call the witness to place the inconsistent statement before the jury under the guise of impeachment. The inconsistent statement must qualify as substantive evidence under Rule 801 (d)(1) or under some other exception to the hearsay rule.

Other rules add to the basic principle of flexible impeachment. Take Rule 612. At first blush, it may seem out of place in a discussion of impeachment, because it is a rule governing refreshing recollection. But it does fit.

Rule 612 expands the common law right of a party to inspect anything used to refresh a witness's recollection at trial to cover documents reviewed before testifying. If the court determines that it is necessary in the interests of justice, then an adverse party is entitled to have the writing produced at the hearing, to inspect it, to cross-examine the witness thereon, and to introduce in evidence those portions that relate to the testimony of the witness. This rule is especially potent in dealing with experts. In both civil and criminal cases, Rule 612 usually requires an expert to disclose all of the documents or information provided to him in advance of testifying. Even work product and privileged communications are not exempt.

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The result is fertile ground for impeachment of the witness's scope, care, and accuracy in reviewing the record evidence with the documents.

Rule 613(a) provides that counsel may question a witness about a prior inconsistent statement in a document without first showing the document to the witness. On its face, this seems to relax the common law rule, which required that the foundation for a prior inconsistent statement be laid before extrinsic evidence is offered. Don't be fooled, however. An inconsistent statement is usually most effective when it is used as close in time to direct examination as possible. Also, some judges are unwilling to subject witnesses to recall for foundational purposes. Rule 613 or not, they may find that the failure to lay a foundation while the witness was first on the stand is a waiver of the right to offer an inconsistent

statement.

The moral is simple. If you want to offer the inconsistent statement before the document--for example, where the same statement might impeach several witnesses and counsel does not want to reveal the statement too early--alert the trial judge that a witness may have to be recalled and seek permission to depart from traditional foundation rules, citing Rule 613(b) and the trial judge's authority under Rule 61 l(a).

My top-ten list also includes an impeachment sleeper, Rule 806. Under Rule 806, a party may impeach a hearsay declarant. The rules for doing so are the same as those for impeaching witnesses generally, except that the foundation requirements are relaxed. Rule 806 is rarely cited and rarely used. But, it makes my top-ten list not because of its past significance, but for its potential importance in combating hearsay testimony.

The rules on lay and expert opinion form a fifth group of rules. Here, too, the Federal Rules are more flexible than the common law. For example, Rule 701 makes short work of the common law distinction between fact and opinion, allowing a lay witness to testify in the form of an opinion, if the opinion is helpful and rationally based on the witness's perceptions. Although a witness may not assume the role of a factfinder and suggest how disputed issues ought to be
decided, the rule permits witnesses to testify as fully as possible about what they perceived.

It is the unusual case these days in which at least one expert witness is not called. Rules 702 and 703 liberalize the admissibility of expert testimony. Expert testimony is not limited to matters beyond the ken of a judge or jury; any helpful testimony may be admitted under Rule 702. Under Rule 703, an expert may rely upon facts or data reasonably relied upon by others in the field even if those facts or data are not independently admissible as evidence.

Rule 702 makes my top ten largely because of the Supreme Court's decision in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 113 S . Ct. 2786 (1993). Under *Daubert*, the trial judge sits as a gatekeeper, assessing both reliability and relevance when an expert's testimony rests on scientific knowledge. *Daubert's* effect on expert testimony other than scientific testimony is the stuff of trial disputes almost daily. The expert rules may be more flexible than the common law approach, but the trial judge still has an important screening role to play.

Hearsay, one of the most difficult of all evidence subjects, is in a class by itself. Rule 801, for example, has completely revamped the basic common law rules. Subsection (a) defines "statement" so as to exclude nonassertive conduct. It is conduct offered not as an assertion but to prove what the actor believed is no longer hearsay, as it was at common law. Subsection 801(c) defines hearsay as focusing not on whether the declarant who made the statement is present in court, but rather on whether the statement was made outside of court. Subsection (d) contains eight categories of statements that are defined as "not hearsay." Certain prior inconsistent statements, certain prior consistent statements of a testifying

witness, and prior identifications by a testifying witness all become nonhearsay under this rule. Personal admissions, adoptive admissions, authorized admissions, and agent's admissions: under Rule 801(d)(2), they are all not hearsay. The Supreme Court's decision in *Bourlaily* also permits a trial judge to consider a challenged hearsay statement in the course of determining whether it qualifies as a coconspirator's statement. This is a departure from many common law decisions that considered only independent evidence that the declarant and any party against whom a statement is offered were members of a conspiracy in determining admissibility.

Is the statement by itself enough to qualify it as a coconspirator's statement? The Supreme Court left that issue undecided in *Bourlaily*. The Advisory Committee on the Federal Rules of Evidence has weighed in against such an approach. In its view, the authorized agent's and coconspirator's statements, standing alone, are insufficient to lay a foundation. The Advisory Committee instead adopted a proposed amendment that the same foundation should be required for all vicarious admissions.

Rule 801 is a "must have" on anyone's top-ten list. It allows virtually every admission, including prior statements of testifying witnesses, vicarious admissions under Rule 801(d)(2)(D) (which are increasingly important in civil cases), and coconspirator statements under Rule 801(d)(2)(E) (which remain important in criminal cases). Rule 801, and especially Rule 801(d), has become a vehicle, *the* vehicle, for getting some of the most powerful hearsay admitted in federal courts.

Hearsay Exceptions

Were this not enough, Rules 803 and 804(b) provide 23 and 4 particular hearsay exceptions, respectively, and each adds a residual exception. I have noted the most commonly used ones on my list. Keep a few critical points in mind.

The present sense impression exception in Rule 801(1) may be confined in time and scope,

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but it is useful for admitting matters such as telephone conversations reported by another or notes taken during conversations, which may not have come in under common law. Rule 803(2), the classic excited utterance exception, has been broadened to include all statements that relate to a startling event or condition. Likewise, Rule 803(4) admits a wider variety of statements made to both treating and diagnosing physicians than was permitted by many common law rules.

Prior recorded recollections come in under Rule 803(5) even when the witness does not have total memory loss. The memorandum or record is not admissible as evidence and must be read to the trier-of-fact. Rule 803(6) expands business records to include the records of any regularly conducted activity. Public records under Rule 803(8) include a broad range of factual findings in public investigations, unless offered against an accused criminal. *See Beech Aircraft Corp. v. Rainey*, 488 U.S. 153 (1988). Finally, Rule 803(18) expands the use of learned treatises on both direct and cross-examination. An expert can read on direct examination from any reliable treatise on which he relied. A cross-examiner may read to an expert during cross-examination

from any treatise that the trial judge finds authoritative, regardless of whether the witness relied on it.

None of these 803 exceptions requires that the declarant be unavailable. Rule 804 is more restrictive, requiring just such a showing. This is very important for former testimony, the most commonly used 804 exception. The key under the rule is that the party *against whom* the former testimony is offered, or a predecessor in interest,

Unlike rules falling in other categories of evidence, none of the hearsay exceptions is so much more important than the others that it warrants a place on the top-ten list. In fact, the final spot on the honor roll goes to a rule that seldom gets recognition at all, and it can be a significant counterweight to the overall liberality of the hearsay rules. Rule 602 provides that a witness may only testify if there is evidence that she is testifying from personal knowledge. The personal knowledge requirement gets plenty of play when a witness testifies at trial, but what about in the case of being hearsay? A witness takes the stand to say that a hearsay declarant with blood on her clothes shouted out that the defendant stabbed the deceased. Sure enough, an excited utterance. But did the declarant have personal knowledge? Maybe the blood came from the declarant's examination of the body after the stabbing occurred. The fact that the declarant was excited does not establish personal knowledge. Be prepared to voice an objection under Rule 602 if you want to keep the statement out. If you are the target of the objection, have your evidence ready at hand to show how the declarant knew what she was talking about.

must have had an opportunity and similar motive as at trial to question the witness.

Most lawyers remember Rules 803(24) and 804(b)(5), the residual exceptions that may apply when no particular exception is satisfied. These are no substitutes for the specific exceptions, which it pays to study and keep ready at hand. If you must resort to these residuals, be forewarned: You must remember to give notice to the other side before offering statements under these rules.

Twenty-three rules. It may seem like a lot, even if the top ten receive most of the attention. In fact, the list may be too short, particularly for lawyers who specialize in particular kinds of litigation. Those who handle negligence cases or product liability cases will probably find the omission of Rule 407 particularly galling. Rules 408 and 411 are dear to the hearts of insurance coverage lawyers. No list will please everyone. Use mine or adapt it for your own use. But learn a list, and keep yourself among the quick, and not the dead.❑